APPENDIX A

91-cv-6515

RKW

LARIMER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United states Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the Fifteeth day of February one thousand nine hundred and ninety-five.

Present:

Honorable Thomas J. Meskill,
Honorable Ralph K. Winter,
Honorable Joseph M. McLaughlin,
Circuit Judges.

ROUTE 17 CORPORATION, a Delaware Corporation registered to do business at Route 17 and Wellsburg Crossover,

Plaintiff-Appellant,

O R D E R

V.

94-7708

TOWN OF ASHLAND, SHELDON ROBINSON, EDWARD BLY, EARL La STATON, ANDREW J. GOTHAM, WALTER JILSON, GARY La PATELUNAS, Individually and as Code Enforcement Officer, and JOSEPH J. BALOK, JR

Defendants-Appellees.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Route 17 Corporation ("Route 17"),, a Delaware corporation registered to do business in the Village of Wellsburg, which is in the Town of Ashland, in the County of Chemung, New York, appeals from Judge Larimer's grant of summary judgment to appellees.

On appeal, Route 17 claims: (i) Local Law No, 1 was improperly adopted; (ii) defendants-appellees failed to carry their burden that Local Law No. 1 was constitutional; (iii) information supporting Local Law No. 1 adduced in the district court by defendants-appellees was inapposite to Local Law No. 1; (iv) Local Law No. 1 is a prior restraint not justified by a substantial government interest; and (v) certain exhibits adduced by defendants-appellees were not properly introduced in the district court.

Route 17 did not raise in the district court its claim that Local Law No. 1 was improperly adopted. We discern no reason to depart from our general rule of refusing to consider matters that were not passed on by the district court. See Singleton v, Wulff, 428 U.S. 106, 120 (1976); First Nat'l Bank v, Pepper, 454 F,2d 626, 636 (2d Cir. 1972).

Route 17 claims that defendants-appellees failed

to demonstrate that Local Law No. 1 was constitutional, We disagree. The Supreme Court has found that regulations that either disperse or concentrate adult-oriented businesses may be analyzed under content-neutral analysis, See City of Renton v. Playtime Theaters, 475 U.S. 41, 49 (1986) ("[Z]oning ordinances designed to combat the undesirable secondary effects of [businesses purveying sexually explicit

materials] are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations.") (citing Young v. American Mini Theaters, 427 U*So 50 (1976)). The Town of Ashland relied on studies and information gathered by other municipalities to conclude that adult-oriented establishments can give rise to a panoply of social difficulties. The Supreme Court has held that it is permissible to so rely, and it was also permissible for the members of Ashland's governing body to rely upon an agent -Town Attorney Joseph Balok -- to research such information. See Renton, 475 U.S. at 51-52. Finally, there were alternative avenues of communication. A relatively large percentage of the land in the Town of Ashland that is zoned for business use could have been used for an adult bookstore under Local Law No, 1. See Marty's Adult World v. Town of Enfield, 20 F.3d 512, 516 (2d Cir. 1994) (banning activities in some places in community but not others does not unreasonably limit alternative avenues of communication).

Route 17's third claim is that the information

the Town of Ashland relied upon was inapposite, The Supreme Court has held that a city can rely on other cities' experiences and on the findings summarized in a court opinion to promulgate an adult theater zoning ordinance. Renton, 475 U.S. at 51. We therefore find that the Town of Ashland could properly rely on studies done by the Town of Islip and on information contained in court opinions.

Route 17's fourth claim that Local Law No. 1 amounts to an unjustified prior restraint bears some resemblance to its second claim. In any event, we find that Local Law No. 1 was a time, place, and manner restriction, Renton, 475 U.S. at 46, because a significant fraction of the land both zoned for business use and near a highway in the town could have been used for an adult-oriented establishment under Local Law No. 1 without any purchase of residential property. Therefore, the information reviewed by the staff of the town board provided a sufficient basis for the regulation.

Route 17's fifth claim is that the exhibits submitted by defendants-appellees to the trial court were not properly attached or submitted to the court. Thus, under Federal Rule of Civil Procedure 56, it was error for the district court to consider this

evidence. See Fed. R. Civ. P. 56(e) ("Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto- or served therewith."). As Route 17 did not make this claim when the materials were submitted to the court, any potential defect was waived. DeCintio v. Westchester County Medical Ctr,., 821 F,2d 111, 114 (2d Cir.) (failure to object below constituted waiver of objection for Rule 56(e) defect), pert. denied, 484 U*So 965 (1987)*

We therefore affirm.

Docket # 94-7708

Hon. Thomas J, Meskill, U,S,C,J.
Hon, Ralph K. Winter, U.S.C,J,

Hon, Joseph M, McLaughlin, U.S.C,J,

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CAUSES BEFORE THIS OR ANY OTHER COURT UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III, CLERK

APPENDIX B

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of April one thousand nine hundred and ninety-five.

Route 17 Corporation

Plaintiff-Appellant
v Dkt No: 94-7708

Town of Ashland, et al 2

Defendants-Appellees

A petition for rehearing containing a,suggestion that the action be reheard in banc having been filed herein by the appellant Route 17 Corporation.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

APPENDIX C

91-cv-6515
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the
Second Circuit held at the United States Courthouse in the City of New York, on the Fifteeth day of February one thousand nine hundred and ninety-five.

Present:

Honorable Thomas J. Meskill,
Honorable Ralph K. Winter,
Honorable Joseph M. McLaughlin,
Circuit Judges.

ROUTE 17 CORPORATION, a Delaware Corporation registered to do business at Route 17 and Wellsburg Crossover,
Plaintiff-Appellant

ORDER

V.
94-7708

TOWN OF ASHLAND SHELDON ROBINSON, EDWARD BLY, EARL L. STATON, ANDREW J. GOTHAM, WALTER JILSON, GARY Lo PATELUNAS, Individually and as Code Enforcement Officer, and JOSEPH J. BALOK, JR.
Defendants-Appellees

Appeal from the United States District Court for

The Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

APPENDIX D

STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROUTE 17 CORPORATION,

Plaintiff,

DECISION

ORDER

V.
91-CV-6515L

TOWN OF ASHLAND, SHELDON ROBINSON, EDWARD BLY, EARL STANTON, ANDREW GOTHAM, WALTER JILSON, GARY M. PATELUNAS and JOSEPH J. BALOK, JR., ESQ.

Defendants.

This action was brought by plaintiff, Route 17 Corporation ("Route 17"), pursuant to the First and Fourteenth Amendments of the United States Constitution for declaratory and injunctive relief and for compensatory damages. Specifically, Route 17 requests that the Court declare a local zoning ordinance of the Town of Ashland, New York ("the Town"), which regulates adult bookstores, unconstitutional. Before the Court is Route 17's motion for summary judgment and a permanent injunction and defendants' cross-motion for summary judgment. For the reasons that follow, Route 17's motion is

denied and defendants' cross-motion is granted. Defendants are the Town, the Town Supervisor, members of the Town Board, the Town's Code Enforcement and Zoning Officer and the Town's attorney.

FACTS

The property at issue in this action is owned by T & R Realty Corporation ("T & R Realty"). On August 31, 1990, T & R Realty submitted building plans and specifications to the Town for construction of a "retail outlet commercial building.' On September 7, 1990, defendant Gary Patelunas, Code Enforcement Officer for the Town, issued a building permit to T & R Realty and construction commenced. Upon completion of the building on May 31, 1991, Patelunas issued a certificate of occupancy to Route 17 to conduct business as "VideoNews Stand-Mercantile." T & R Realty leased the property to Route 17, which planned to operate an adult bookstore on the premises.

At the same time that the certificate of occupancy was issued, Patelunas delivered a letter to T & R Realty, along with a copy of @ Law No. 5 of 1990. Patelunas' May 31, 1991 letter stated: 'Please be advised that the Town of Ashland now has a Local Law #51990, pertaining to the Regulating of the Operation and Maintenance of Adult Book Stores.' Local Law No. 5 ("the ordinance") regulates adult bookstores by precluding their operation at certain locations within the Town. Pursuant to the ordinance, it is unlawful to operate an adult bookstore within 150

feet of a school bus stop, within 1000 feet of a library, park or playground, and within 500 feet of a residential dwelling, church, convent, monastery, school or other adult bookstore.

The ordinance defined adult bookstore as: 'An establishment having, as a substantial or significant portion of its stock-in-trade, books,, magazines and other periodicals which are distinguished or characterized by their emphasis on matter depicting or relating to specified secual [sic] activity or specified anatomical areas, . . . for observation by patrons therein.' The penalty for violating the ordinance is a fine of up to $250.00 for each day that the establishment operates in violation of the ordinance.

The ordinance was adopted by the Town Board on May 9, 1990. Apparently, this ordinance was not accepted by the New York State Department of State ("Department of State") and therefore it did not become law. However, the ordinance was renumbered as Local Law No. 1 of 1990 and became effective when it was refiled with the Department of State on January 31, 1991. The only difference between @ Law No. I and @ Law No. 5, the original ordinance, appears to be its numerical designation.

On October 28, 1991, Route 17's adult bookstore opened for business. Three days later, Patelunas purchased an adult magazine and video at the premises. That same day, October 31, 1994, Patelunas delivered a 'Cease and Desist Order" to Route 17 and T & R Realty which stated:

PLEASE BE ADVISED that you are in violation of the Law No. I for the year 1990 known as The Regulating of the Operation and Maintenance of Adult Book Stores."

YOU ARE HEREBY ORDERED AND DIRECTED to cease violation on or before November 7, 1991.

In the event you continue in violation of said Law, the appropriate legal proceedings will be commenced against you.

Route 17 complied with the October 31, 1999 order and ceased operation on November 7, 1991. Route 17's business has remained closed since that time.

DISCUSSION

1. Standards for Summary Judgment

A motion for summary judgment may be granted only when there is no genuine issue of material fact remaining for trial and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

All ambiguities and inferences must be resolved in favor of the non-moving party and all doubts as to the existence of a genuine material issue for trial should be resolved against the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); Brady v, Town of Colchester, 863 F.2d 205, 210 (2d Cir. 1988).

If, when '[v]iewing the evidence produced in the light most favorable to the nonmovant . . . a rational trier could not find for the nonmovant, then there is no genuine of issue of material fact and entry of summary judgment is appropriate." Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir. 1991); Binder v. Long Island Lighting Co., 933 F.2d 187, 191 (2d Cir. 1991); Coach Leatherware Co. V. AnnTaylor, Inc., 933 F.2d 162, 167 (2d Cir. 1991).

Finally, the fact that both parties have moved

for summary judgment does not mean that the Court must grant summary judgment for one of the parties, and it does not change the burden on the moving party to show the absence of a genuine issue of fact. Eastman Mach. Co. v. United States, 841 F.2d 469, 473 (.2d CIT. 1988). Each party's motion must be evaluated on its own merits and all reasonable inferences must be drawn against the party whose motion is under consideration. Schwabenbauer v. Board of Educ. of Olean, 667 F.2d 305, 314 (2d Cir. 1981).

II. Constitutionality of Local Law No.1

Route 17 moves for summary judgment and for entry of a permanent injunction on its claim that the ordinance is unconstitutional, void and unenforceable as written and as applied under the First and Fourteenth Amendments. In particular, Route 17 maintains that this ordinance is a 'content-based' regulation of speech and constitutes a "prior restraint' that is prohibited under well-established constitutional principles. In its view, the ordinance, in effect, bans the selling of constitutionally protected material.

Defendants contend that the ordinance is a valid zoning ordinance designed to address the secondary

effects of adult bookstores. They maintain that the ordinance is a "contentneutral' time, place and manner regulation because its purpose is to limit the operation of certain @s of businesses in certain areas of the Town. According to defendants, the ordinance does not ban adult bookstores; it just restricts their maintenance in certain areas. Defendants have cross-moved for summary judgment on the grounds that the ordinance is not unconstitutional on its face or as applied to Route 17.

There is no dispute that, as a general proposition, Route 17's operation of the bookstore involves 'expression" that is protected by the First and Fourteenth Amendments. There is also no claim that Route 17's stock-in-trade is obscene and, therefore, not protected by the First Amendment.

The initial inquiry into the constitutionality of the ordinance is, therefore, whether it is a content-based or content-neutral zoning ordinance. City of Renton v. Playtime Theaters, n@, 475 U.S. 41P 46 (1986); Young v. American Mini Theaters, Inc., 427 U.S. 50, 63 (1976); ILQ Investments, Inc., v. City of Rochester, 816 F.Supp. 516, 524 (D.Minn. 1993).

A) Content-based Versus Content-neutral

Route 17 maintains that the ordinance is a

content-based zoning ordinance because its purpose is to prohibit the sale of adult material based solely on its content. Defendants contend that the Ashland ordinance seeks to prevent the secondary effects of adult bookstores and as such, is a content-neutral time, place and manner regulation.

The purpose of content-based ordinances is to restrain certain types of speech or expression and as such, they are presumptively violative of the First Amendment. Renton, 475 U.S. at 46-47; Carey v. Brown, 447 U.S. 455, 462-63 n.7 (1980). Content-neutral regulations, on the other hand, regulate activities without reference to the content of the speech or expression and are presumptively valid. Virginia State Bd. of Pharmacy v,. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976); ILQ Investments, 816 F.Supp. at 524.

The Supreme Court has settled the issue of whether regulations which dictate where sexually-orientated businesses can locate are to be considered content-based or content-neutral time, place and manner regulations. In Renton, supra, the Court stated that w[alt first glance, the Renton ordinance, like the ordinance in American Mini Theaters, Inc. does not appear to fit neatly into the 'content-based'

or the 'content-neutral' category.' 475 U.S.

47. However, because the ordinance was not aimed at the content of the films to be shown at the theater, but rather at the secondary effects that such businesses had on the surrounding community, the Court held that it was to be "reviewed under the standards applicable to content-neutral' time, place and manner regulations." Renton, 475 U.S. at 49.

The ordinance at issue here is similar to the zoning ordinance at issue in Renton. There, the ordinance in question prohibited adult movie theaters from locating within 1000 feet of any residential zone, single or multi-family dwelling, church, park or school. The Supreme Court held that this 'ordinance represents a valid governmental response to the 'admittedly serious problem' created by adult theaters.' Id. at 54. Moreover, the Supreme Court found that the city did not use "'the power to zone as a pretext for suppressing expression,' but rather ... sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas.' Id.

On its face, the Town's ordinance states that it

is designed to combat the 'adverse effects" that adult bookstores have on the surrounding neighborhood and the threat that such enterprises pose to the 'welfare and safety" of the public. LoW Law No. 1, Art. I. This statement of the Town's intent in enacting the ordinance "is more than adequate to establish that the [Town's] pursuit of its zoning interests . . . was unrelated to the suppression of free expression" and, therefore, the ordinance may be characterized as a content-neutral time, place and manner regulation. IL at 48. "[A] city's 'interest in attempting to preserve the quality of . . . life is one that must be accorded high respect'." Id. at 50 (quoting American Mini Theaters, 427 U.S. at 71).

Having determined that the ordinance is a content-neutral time, place and manner regulation does not, however, end the inquiry. Content-neutral time, place and manner regulations may still be unconstitutional unless they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. Renton, 475 U.S. at 47; Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 7899 807 (1984); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647-48

(1981).

B) Substantial Governmental Interest

The Town's stated purpose for the Ashland ordinance is to avoid the secondary effects that adult bookstores have on the adjacent area, which, if not regulated, could contribute to the blighting or downgrading of the surrounding neighborhood or pose a threat to the welfare and safety of the public.' Local Law No. 1 of 1990 at Art. 1, § 1. In Renton, the Supreme Court recognized a city's substantial interest in protecting the quality of life from the secondary effects of adult businesses. 475 U.S. at 50. The Renton Court also recognized, however, that the enacting body must have some evidence before it concerning the ills it seeks to avoid in order to show that the ordinance is designed to serve a substantial governmental interest. This evidence need not be based on empirical data from or particular problems in the Town. According to the Renton Court:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

id. at 51-52.

Therefore, the Town could rely on the experiences and studies of other communities, and the findings relating to these concerns in other state court opinions. See Mitchell v. Commission on Adult Entertainment Establishments of the State of Del., 10 F.3d 123@ 134 (3d Cir. 1.993) (court indicating that city could rely on the "detailed findings summarized in another state"s court opinion); 11126 Baltimore Blvd, v. Prince George's County, Md., 886 F,2d 14159 1422 (4th Cir. 1989). vacated on other grounds, 496 U.S. 901 (1990) (court indicating that county could rely on 'little more than general, nonscientific and conclusory statements about sexually orientated businesses.')

In support of its cross-motion for summary judgment, the Town submitted surveys taken from its residents to demonstrate their concern over the secondary effects of adult bookstores. The Town has also submitted studies from the Town of Islip, New York, Indianapolis, Indiana and Cincinnati, Ohio which discussed the secondary effects of adult bookstores. These studies were reviewed by the Town attorney prior to the enactment of the ordinance. In addition, the Town had before it a decision from the New York State

Court of Appeals which summarized Islip's experience with the secondary effects of adult bookstores and upheld the constitutionality of the Islip ordinance. Generally Town of Islip Caviglia, 73 N.Y.2d 544 (1989). In fact, the Town modeled its ordinance after the Islip ordiance. Route 17 maintains that these submissions are not enough to show a substantial governmental interest because the studies done in, lslip, Indianapolis and Cincinnati deal primarily with the primarily with the secondary effects traditionally associated with adult movie theaters and "Peep shows." According to Route 17, their store deals primarily with 'take home printed books, magazines and other periodicals" which do not have the same secondary effects.

Renton requires only that the Town submit evidence which is "reasonably believed to be relevant to the problem" that the Town is addressing. The Renton court specifically declined to impose "an unnecessary rigid burden of proof" on the city for justifying the enactment of such ordinances. 472 U.S. at 50. The Supreme Court in Renton held that the City of Renton could rely on the experiences of Seattle which were summarized in an opinion issued by the Supreme Court of Washington,' when it enacted its

ordinance.

Here, the Town of Ashland relied not only on the experiences of other cities, but on the concerns of their residents. In addition, the Town had before it a summary of Islip's experiences. This is more than enough evidence to show a reasonable basis for the Town's belief that an ordinance was justified to combat these potential problems. See Genusa v. City of Peoria, 619 F.2d 1203, 1211 (7th Cir. 1980) (holding that a "city need not await deterioration in order to act").

Route 17's contention that the studies relied upon by the Town deal primarily with theaters and peep shows and, therefore, are not reasonably related to the perceived secondary effects of adult bookstores is inaccurate. A review of the material considered by the Town reveals that the studies pertained to the secondary effects of all types of adult entertainment, including adult bookstores. Indeed, Town of Islip v. Caviglia, supra, was a challenge to the Islip regulation as it pertained to adult bookstores, not theaters or peep shows.

Northend Cinema, Inc. v. City of Seattle, 90 Wash.2d 709 (1978), cert. denied, 441 U.S. 946 (1979).

The Ashland ordinance is, therefore, designed to

serve a substantial governmental interest. The remaining issue is to determine whether the Ashland ordinance allows for alternative means for this type of "expression."

C) Alternative Avenues of Communication

"It is, of course, clear that 'a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate'." Mitchell, 10 F.3d at 139 (quoting Taxpayers for Vincent, 466 U.S. at 812). Therefore, the final inquiry into the constitutionality of Ashland's ordinance is to determine whether it allows for alternative avenues of communication and whether these alternative avenues are adequate. Renton, 475 U.S. at 53; Lakeland Lounge of Jackson, Inc, v. City of Jackson, Miss., 973 F.2d 1255, 1259 (5th Cir. 1992), cert. denied, 113 S.Ct. 1845 (1993). In other words, does the ordinance afford Route 17 a reasonable opportunity to open and operate an adult bookstore in compliance with the ordinance within the Town?

"The Supreme Court has made clear that zoning regulations that ban activities in some parts of a community but not others do not limit unreasonably other alternative avenues of communication." Marty's

Adult World of Enfield, Inc, v. Town of Enfield Ct., 20 F.3d 512, 516 (2d Cir. 1994) (citing Renton, 475 U.S. at 53-54; Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 75-76 (1981)).

Ordinances which zone businesses out of existence or prohibit all types of speech or expression have been held to preclude alternative avenues of communication and are, therefore, unconstitutional. See Schad, 452 U.S. at 66 (1981) Local ordinance prohibited all live entertainment including non-obscene, nude dancing); Erznoznik v. City of Jacksonville, 422 U.S. 2059 213 (1975) Local ordinance prohibited "display of all films containing uncovered buttocks or breasts," regardless of context).

On its face, Ashland's ordinance does not prohibit all adult bookstores. Route 17 contends, however, that the practical effect of the Ashland ordinance is to do just that -eliminate all adult bookstores. I disagree. I believe that the proof shows the contrary. The Town has identified several parcels, some on the same interstate highway where Route 17's establishment is currently located and another parcel owned by an owner of T & R Realty and Route 17, which can be used to operate an adult

bookstore.

Route 17 contends, however, that these available parcels of land make up only . I % of the entire acreage of the Town. In addition, Route 17 contends that of the parcels available for operation of an adult bookstore, most are either not for sale or are not economically ideal for such a venture.

First of all, the fact that the available parcels of land are not for sale or are less desirable for economic reasons is not controlling. "The inquiry for First Amendment purposes is not concerned with economic impact." Renton, 475 U.S. at 54 (quoting American Mini Theaters, 427 U.S. at 78). There is no requirement that the alternate sites be economically viable or that they be for sale. Lakeland Lounge, 973 F.2d at 1260. "[Route 17] must fend for [itself in the real estate market, on an equal footing with other prospective purchasers and lessees." Renton, 475 U.S. at 54.

With respect to the available acreage, a review of the survey maps and affidavits submitted by the Town and Route 17 reveals that most of the Town is not zoned for business uses. Of those parcels that are zoned for business uses and which are on an interstate highway, where Route 17 is currently located,

approximately 40% could be utilized for the operation of an adult bookstore. (Affidavit Dennis J. Weiland 7-8). See Renton, 475 U.S. at 53 (5% of the land available for adult uses).

Route 17's claim that the ordinance is unconstitutional because in effect, it prohibits the sale of constitutionally protected material is, therefore, without merit and must be rejected. The ordinance is a content-neutral time, place and manner regulation designed to serve a substantial governmental interest which permits alternative means for engaging in the "expression" associated with such an enterprise.

CONCLUSION

Route 17's motion for summary judgment and for issuance of a permanent injunction is denied. Defendants' cross-motion for summary judgment is granted and the complaint is dismissed.

IT IS SO ORDERED.

DAVID G. LARIMER

UNITED STATES DISTRICT JUDGE

Dated: Rochester, New York

June 10 1994.

APPENDIX E

AO 450 (Rev. 5195) Judgment In a Civil Case

United States District Court
WESTERN DISTRICT OF NEW YORK

ROUTE 17 CORPORATION
JUDGMENT IN A CIVIL CASE

V.

TOWN OF ASHLAND SHELDON ROBINSON

EDWARD BLY, EARL STANTON,

ANDREW J. GOTHAM, WALTER JILSON,

CASE NUMBER: 91-CV-6515L

GARY M. PATELUNAS, and JOSEPH J,

BALOK, JR,, ESQ.

Jury Verdict.This action came before the Court for a trial by jury. The issues have been heard and the jury has rendered its verdict.

Decision by Court. This action came to or hearing before the Court. The issues have been heard and a

decision has been rendered.

IT IS ORDERED AND ADJUDGED that the complaint is dismissed. June 13, 1994

Rodney C. Early

Date

APPENDIX F

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

ROUTE 17 CORPORATION,

Plaintiff,

ORDER

91-CV-6515

V.

91-CV-6515L

TOWN OF ASHLAND, SHELDON ROBINSON, EDWARD BLY, EARL STANTON, ANDREW J. GOTHAM, WALTER JILSON, GARY M.

PATELUNAS and JOSEPH J. BALOK, JR. 2 ESQ.

Defendants.

A dispute has arisen between the parties as to whether certain material should be included as part of the record on appeal. Specifically, the dispute arises in connection with plaintiff's preparation of the Appendix.

The parties have submitted several letters to the Court in support of their respective positions.

There are three groups of materials that are in dispute, all of which were contained in a file maintained by attorney Joseph J. Balok, Jr. ("Balok file"):

1. Copies of studies and support materials which were used by the Town of Islip in developing its local regulation of adult entertainment;

2. A number of surveys sent to and completed by residents of the Village of Wellsburg ("Wellsburg surveys");

3. A memorandum and attachments from the Chemung County Planning Department dated October 1,

1990.

I have reviewed the materials submitted on the motion for summary judgment, the oral argument and other pleadings in the case, and it is my judgment that all of the above items should be part of the record in this case.

Concerning the Balok file, particularly the Town of Islip studies and support material, this material is mentioned in attorney Balok's affidavit, sworn to January 26, 1996 (i 6), and in that affidavit Balok indicates that he expected counsel for the defendant, Town of Ashland, to supply the file to the Court (I 6). In fact, the file was sent to the Court and the Clerk's docket entry shows that it was received on January 31, 1994.

Concerning the Wellsburg surveys, these were referenced in the affidavit of Ransom P. Reynolds, Esq., sworn to on January 28, 1994, (i 12), as well as the affidavit of attorney Balok (I 4). It appears that these surveys were sent to plaintiff's counsel and were delivered to the Court on or about March 11, 1994. They should be part of the record.

Concerning the memo from the Chemung County Planning Department, that item was also referenced in affidavits submitted by the defendants (i 12 of

affidavit of attorney Reynolds and 1 5 of attorney Balok's affidavit) and was received by the Clerk of the Court on January 31, 1994, as part of the Balok file. It also appears that the same memo was attached to plaintiff's motion for summary judgment as Exhibit I.

All of the above items should be considered part of the record on appeal. Because there are voluminous documents contained in both the Balok file and the Wellsburg surveys, it may not be necessary to include all those items in the Appendix. Rule 30, Fed. R. App. P. clearly provides that not all items in the District Court record need be included in the Appendix.

I will leave the final decision to the parties as to whether these items should be part of the Appendix, in accordance with Rule 30(b), Fed. R. App. P. This decision is meant to clarify for the parties that the above disputed items are part of the record In the District Court and as such they should be available to the Second Circuit on appeal.

IT IS SO ORDERED,

DAVID G. LARIMER

UNITED STATES DISTRICT JUDGE

Dated: Dated: Rochester, New York

September 14 1994.

APPENDIX G NEW YORK
STATE DEPARTMENT OF

STATE 162 Washington Avenue

Local Law Filing

DEPARTMENT of Ashland
Town
1991

Local Law N. 1 of the year 1990

A local law to be known as "THE REGULATING OF THE OPERATION AND MAINTENANCE OF ADULT BOOKSTORES"

Be it enacted by the Town Board

Town of Ashland

ARTICLE I

SECTION 1. Findings; purpose.

In the development and execution of this Local Law, i@ is recognized that adult bookstores,, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances, thereby having a deleterious effect upon the adjacent area. Special regulation of such uses is necessary to ensure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood or pose a threat to the welfare and safety of the public.

SECTION 2, Definitions,

As used in this Local Law, the following terms shall have the meanings indicated:

ADULT BOOKSTORE - An establishment having, as a substantial or significant portion of its stock-in-trade, books, magazines and other periodicals which are distinguished or characterized by their emphasis on matter depicting or relating to specified secual activity or specific anatomical areas, as defined below, for observation by patrons therein.

SPECIFIED ANATOMICAL AREAS:

A. Less than completely and opaquely covered human genitals, public region, buttock and female breast below a point immediately above the top of the areola,

B. Human male genitals in a discernibly turgid

state,, even if completely and opaquely covered.

SPECIFIED SEXUAL ACTIVITIES:

A. Human genitals in a state of sexual stimulation of arousal.

B. Acts of human masturbation, sexual intercourse or sodomy. (If additional space Is needed, attach pages the same size as this sheet, and number each.) DOS-239 (Rev. 7/90)

C, Fondling or other erotic touching of human genitals, public region, buttock or female breast.

SECTION 3, Proximity to residential dwellings or other adult bookstores,

It shall be unlawful to hereafter establish any adult bookstore within five hundred (500) feet of any building containing a residential dwelling or rooming unit or to establish any adult bookstore within five hundred (500) feet of any other adult bookstore.

SECTION 4. Proximity to School and School bus stops,

It shall be unlawful to hereafter establish any adult bookstore within five hundred (500) feet of the real property line of any public, private or parochial school or within one hundred fifty (150) feet of a bus stop for the picking up and dropping off of school children.

SECTION 5. Proximity to libraries, parks and places of worship,

It shall be unlawful to hereafter establish any adult bookstore within one thousand (1000) feet of the nearest property line of -.-@y public or private, library,, park or playground and at least five hundred (500) feet from the nearest property line of any church, convent, monastery, synagogue or other place of worship.

SECTION 6, Penalties for offenses,

Any person who violates any of the provisions of this local law shall be guilty of a violation and subject to a fine not to exceed Two Hundred Fifty ($250.00) Dollars, Each day during any portion in which any violation of this Iocal Law is committed, permitted or continued shall constitute a separate offense,

ARTICLE II

SECTION 7, Unlawful to promote.

It shall be unlawful and a misdemeanor, punishable as authorized by state law, for any person to promote or possess with intent to promote any obscene material when knowing of its content and character, Each day that said violation continues may be treated as a separate offense.

SECTION 8, Presumptive evidence,

A person who promotes obscene material or possesses the same with intent to promote it,, in the course of his business, is presumed to do so with knowledge or its content and character,

SECTION 9, Definitions.

For the purposes of this Local Law.,the following terms shall have the meanings indicated-.

MATERIAL - Anything tangible, capable of being used or adapted to ,-arouse interest,, whether through the medium of reading, observation, sound or in any other manner.

OBSCENE - Any material or performance is "obscene" if the average person, applying contemporary community standards, would find that, considered as a whole, its predominant appeal is to the prurient interest in sex and depicts. or describes, in a patently offensive manner, actual or simulated sexual intercourse, sodomy,, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals and, as considered as a whole,, it lacks serious literary, artistic, political and scientific value. Predominant appeal shall be judged with reference to ordinary adults, unless it appears from

the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audiences.

PROMOTE - To manufacture,, issue, sell, give, provide,, lend,, mail, deliver, transmute, publish, distribute, circulate, disseminate, present,, exhibit or advertise or to offer or agree to do the same.

SECTION 10. Presumptions.

A* A person who promotes or wholesale promotes obscene material or possesses the same with intent to promote or wholesale promote it, in the course of his business, is presumed to do so with knowledge of its content and character,

B. A person who possesses six (6) or more identical or similar obscene articles is presumed to possess them with intent to promote the same.

SECTION 11. Penalties for offenses.

Any person who violates any of the provisions of this Local Law shall be guilty of a violation and subject to a fine not to exceed Two Hundred Fifty ($250.00) Dollars. Each day during any portion in which any violation of-this Local Law is committed, permitted or continued shall constitute a separate offense.

ARTICLE III

SECTION 12, Definitions,

HARMFUL TO MINORS - That quality of any description or representation, in whatever form, or nudity,, sexual conduct, sexual excitement or sadomasochist abuse when it;

A. Predominantly appeals to the prurient,, shameful or morbid interest of minors.

B. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.

C. Is, when taken as a whole, lacking in serious

literary, artistic, political or scientific value for minors.

KNOWINGLY - Having a general knowledge of, or reason to know,, or a belief or grounds for belief which warrants further inspection or inquiry or both:

A. The character and content of any material described herein
which is reasonably susceptible to examination by the defendant; and

B. The age of the minor, provided, however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable, bona fide attempt to ascertain the true age of such minor.

MINOR - A person less than seventeen (17) years of age.

SADINASICGUSTUC ABUSE - Actual or explicitly simulated flagellation or torture by or upon a person who is nude or chad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of the one so clothes.

SEXUAL CONDUCT - Actual or explicitly simulated acts of masturbation, homosexuality, sexual intercourse or physical contact in an act of- apparent sexual stimulation or gratification with a person's clothed or unclothed genitals,, public area, buttocks, or if such be female, breast,

SEXUAL EXCITEMENT - The condition of human male or female, genitals when in a state of sexual stimulation or arousal.

SEXUALLY EXPLICIT NUDITY - A state of undress so as to expose the human male or female genitals,, public area or buttocks with less than a fully opaque covering, or the showing of the female breast with less @ a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state.

SECTION 13. Unlawful acts.

A. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(1) Any picture, photograph, drawing, sculpture,, video cassette,, motion-picture film or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to minors; or

(2) Any book, pamphlet, magazine, or printed matter,, however reproduced,, or sound recording which contains any manner enumerated in Subsection A(1) of this section or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to minors.

Be It shall be unlawful for any person knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor to any area of premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to minors or to exhibit any such motion picture at any such area of premises which is not designated to prevent viewing from any public way of such motion picture by minors not admitted to any such area of premises.

Co It shall be unlawful for any minor falsely to represent to any person mentioned in Subsection A or B hereof, or to his agent, that such minor is seventeen (17) years of age or older, with the intent to procure any material set forth in Subsection A or with the intent to procure such minor's admission to any motion picture, show or other presentation, as set forth in Subsection B.

D. It shall be unlawful for any person knowingly to make a false representation to any person mentioned in Subsection A or B hereof, or to his agent, that he is the parent or guardian of any minor or hat any minor is seventeen (17) years of age or older with the intent to procure any material set forth in Subsection A or with the intent to procure such minor's admission to any motion picture, show or other presentation, as set forth in Subsection B,

E. It shall be unlawful for any person knowingly to exhibit, expose or display in public, at newsstands or at any other area of a public or commercial establishment frequented by minors or where minors are or may be invited as part of the general public:

(1) Any picture, photograph, drawing, sculpture, motion-picture film or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse which is harmful to minors; or

(2) Any book, pamphlet, magazine or printed matter., however reproduced,, or sound recording which contains any matter enumerated in Subsection E(1) of this section or explicit or detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to minors.

SECTION 14. Exceptions,

Nothing contained in this Local Law shall be construed to apply to:

A. The purchase, distribution, exhibition or loan of any work of art, book, magazine or other printed or manuscript material by any accredited museum, library, school or institution of higher learning.

B. The exhibition or performance of any play, drama, tableau or motion picture by any theater, museum, school or institution of higher learning,, either supported by public appropriation or which is

an accredited institution supported by private funds,

C. Persons who may possess or distribute obscene matter or participate in conduct otherwise prescribed by this Local Law when such possession, participation distribution or conduct occurs in the course of law enforcement activities or in the course of bona fide scientific, educational or comparable research or study or like circumstances of justification.

SECTION 15, Penalties for offenses,

Any person who violates any of the provisions of this Local law shall be guilty of a violation and subject to a fine not to exceed Two Hundred Fifty ($250.00) Dollars. Each day during any portion in which any violation of this Local law is committed, permitted or continued shall constitute a separate offense.

SECTION 16. Severability,

Should any section or provisions of this Local Law be declared by any court to be unconstitutional or invalid,, such declaration shall not affect the validity of this Local Law as a whole or any part thereof, other than the part so declared to be unconstitutional or invalid.

SECTION 17, Effective Date.

This Local Law shall become effective immediately upon filing with the New York Secretary of State.

APPENDIX H
COMPREHENSIVE ZONING PLAN
TOWN OF ASHLAND
CHEMUNG COUNTY, NEW YORK

Zoning Ordinance Adopted
November 13, 1963

Comprehensive Zoning Plan
Local Law No. 1 of 1978
Adopted Sept. 13, 1978

Amended Local Law 01, 1980

Special Flood Hazard Resolution Page #42 Adopted June 11, 1980

Flood Insurance Rate Map
on file at Town Clerks Office

COMPREHENSIVE ZONING PLAN FOR THE TOWN OF ASHLAND CHEMUNG COUNTY, NEW YORK.

Be it enacted by the Town Board of the Town of Ashland t Chemung County, New York as follows:

ARTICLE I @ PURPOSES

Section 1. Enactment and Purposes

There is hereby established a comprehensive zoning plan for the Town of Ashland, Chemung County# New York, which plan is set forth in the text, maps, and schedules which constitute this local law, Said plan is adopted for the purposes set forth in Article 16 Chapter 62 of the Consolidated Laws of the State of New York, and more particularly for the protection and promotion of the public health, safety# convenience, morals and general welfare of the community as

follows:

1. To guide the future growth and development of the Town in accordance with a comprehensive plan of land use and population density that represents and pro@ motes beneficial and convenient relationships among

residential, commercial, industrial and public areas within the Town, considering the suitability of each area for such uses, as indicated by existing conditions, trends in population and mode of living.

2. To provide adequate light, air and privacy; to secure safety from fire, flood and other danger, and to prevent overcrowding of the land and undue congestion of the population.

3. To protect and conserve the character, the environment and the stability and value of all parts of the Town and to encourage the orderly and beneficial development of all parts of the Town.

4. To bring about the gradual conformity of the uses of land and buildings throughout the Town to the comprehensive Zoning Plan set forth in this Local Law, and to minimize conflicts among the uses of land and buildings.

5. To promote the beneficial circulation of traffic throughout the Town, having particular regard to the avoidance of congestion in the streets and the provision of safe and convenient traffic movements.

6. To provide a guide for public policy and action in the efficient provision of public facilities and services for private enterprise in building development, investment and other economic activity relating to uses of land and buildings throughout the Town,

ARTICLE II DEFINITIONS

Section 2. Definitions

For the purpose of this local law, certain words and terms shall have the meaning specified in this section. Except where specifically defined herein, all words used in this local law shall carry their customary meanings. Words used in the present tense include the future; the singular number includes the plural and the plural the singular. The word 'lot' includes the words "plot" or "parcel". The word

"building" includes the word "structure". The words "used" or "occupied" include the words "designed or intended to be used" or "designed or intended to be occupied". The word "person" includes the words "firm". "association", "organization". "partnership". "trust". company. "corporation". and "individual", The word "shall" is intended to be mandatory.

Boarding House - Any dwelling in which more than three persons either individually or as families, are housed or lodged with or without meals for which compensation'-!-s'-paid, either directly or indirectly. The term "boarding house,' shall include "rooming house",, "lodgind house",, but not "foster home".

Dwelling @ A building designed or used exclusively

living quarters for one or more families. A dwelling shall not be deemed to include an automobile court, motels hotel, boarding house, tourist home or tent.

Dwelling Unit @ A building or portion thereof providing complete living facilities for one family,

Hotel - A building containing rooms intended to be used, rented, or hire(I out to be occupied for sleeping purposes by guests and where only a general kitchen and dining 'room and other customer features are provided within the building or in an accessory build@ inn. Motel @ Any building or group of buildings, detached or in connected units, designed for or used as individual sleeping units and provided with automobile parking space convenient to each unit and including incidental services for a transient clientele, The term "motel" shall include "tourist court',# automobile court". and "Motor lodge".

ARTICLE III - ESTABLISHMENT OF DISTRICTS AnD APPLICATION OF DISTRICT REGULATION

Section 3 @ Districts Established

The Town of Ashland is hereby divided into the following types of zoning districts:

Residence-AgriculturalRA	
Residence	R-1
Residence	R-2
Business	B.
Flood Hazard Overlay	FH
Planned Development	PD

Section 4 - Zoning Map

The boundaries of the zoning districts hereby established are shown on the Official Zoning Map, which, together with all explanatory matter thereon, is hereby adopted by reference and declared to be a part of this local law. The Official Zoning Map shall be identified by the signature of the Supervisor attested by the Town Clerk following the words: "This is to certify that this is the Official Zoning Map referred to in Section 4 of the Zoning Law of the Town of Ashland. No amendment to this local law which involves matter portrayed on the Official Zoning Map shall become effective until after such change and entry has been made on

said map. The official zoning map shall be kept on file in the office of the Town Clerk,"

ARTICLE. SCHEDULE OF DISTRICT

REGULATIONS.

Section 16

District regulations shall be set forth in the schedule of District Regulations which is hereby adopted by reference and declared to be a part of this local law. The regulations appearing in this Schedule are subject to the supplementary

provisions of this local law*

SCHEDULE OF DISTRICT REGULATIONS

DISTRICT	PERMITTED PRINCIPAL USES	PERMITTED ACCESSORY USES
B	Retail stores bank, restaurant outdoor professional or and business office and similar establishments	
	Service shops and studios such as shoe repair barber, beauty parlor	
	Retail outlets for cleaning, or pressing, and dyeing.	
	Gasoline service stations.	
	Motel, hotel, theater, drive-in.	
	Automobile sales or servicing garage for the repair and storage of automotive vehicles.	
	Wholesale storage and warehousing in roofed structures.	
	Building, plumbing, electrical and similar contractor's establishments, provided all storage of supplies is in a roofed structure.	
	Commercial miniature or "Par-3 golf course or driving range.	

Section 44 - Amendments, How Initiated

The Town Board may from time to time on its own motion or on petition amend, supplement, repeal, or change the regulations and district boundaries established by this local law. The Planning Board may, by resolution, propose an amendment, supplement, change or repeal of the regulations or district boundaries to the Town Board.

Section 45 @ Referral of Proposed

Amendments to Planning Board

All proposed amendments originating by petition or by motion of the Town Board shall be referred to the Planning Board for a report and recommendations before the Town Board acts thereon. The Planning Board shall submit its report within sixty (60) days after receiving such referral.

Section 46 @ Notice and Hearing on Proposed Amendments

Before any amendment, supplements repeal, or change in the regulations or district boundaries, there shall be public notice and hearing thereon as provided by law.

APPENDIX I

AMENDMENTS TO THE CONSTITUTION

Amendment I

(Freedo)yi of Religion, of Speech, and *of the Press)*

Congress shall make no law respecting an establishment or religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and petition the Government for a redress of grievances.

Amendment XIV

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United

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States and of the States wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.